

# LAWYERS JOURNAL

## Record companies score two victories in one case against online music sharing

By Thomas C. Welshonice

A group of U.S. record companies scored two major victories late last year in one civil case against a Minnesota woman. The case is *Virgin Records America, Inc. v. Thomas*, 06-1497 D. Minn. 2006. The defendant, Jammie Thomas, a 30-year-old single mother from Brainerd, Minn., was sued by seven major record companies in April 2006 for sharing copyrighted songs on a popular online file sharing service, in violation of the companies' copyright interests in the songs. In October 2007, a jury found that Thomas willfully infringed the copyrights of 24 songs and awarded the record companies damages in the amount of \$222,000. In December, the U.S. Department of Justice threw its support behind the record companies by asking a federal judge to uphold the constitutionality of the award, which Thomas and some critics have characterized as unconstitutionally out of proportion to the actual damages suffered by the record companies.

In the late 1990s, high speed internet access became more widely available in the United States. One advantage of high speed internet access is the ability to transfer large files—including large music and audio files, known as MP3s—from one computer to another. This practice grew rapidly as organized online file sharing networks like Napster and KaZaa sprung up, allowing users in different states and countries to exchange MP3s without ever meeting each other and with just a few clicks of the mouse.

The problem with the online file sharing networks was that they were frequently used to share MP3s of copyrighted music. Under copyright law, the owner of the copyright in a sound recording has the exclusive right to distribute that recording. Consequently, almost every time a person shared music over a file sharing network, that distribution constituted copyright infringement.

Record companies first attacked the unlawful online music sharing by suing the file sharing networks. These lawsuits eventually forced some of the major filing sharing networks to shut down—but other networks soon emerged to handle the growing demand for free online file sharing. In 2003, partially as a way to raise awareness of the real consequences of copyright infringement, record companies began filing lawsuits against individual users of the file sharing networks.

On April 19, 2006, seven record companies filed a lawsuit against Jammie Thomas in the U.S. District Court for the District of Minnesota. The record companies alleged that Thomas unlawfully shared hundreds of MP3s of copyrighted

music with other users around the world through the KaZaa file sharing network, and asked that Thomas be permanently enjoined from unlawfully sharing copyrighted music.

In addition, the record companies asked that the court award "statutory damages" against Thomas. Under Section 504 of the Copyright Act, if a copyright owner has properly registered a work with the U.S. Copyright Office, an infringer of the copyright in that work is usually liable to the owner for statutory damages of \$750 to \$30,000 per work. In cases in which the owner proves that the infringement was willful, the damages may be increased to up to \$150,000 per work.

After more than a year of discovery and substantive and procedural motions, the case against Thomas went to trial on Oct. 1, 2007. On Oct. 4, 2007, the jury returned a verdict, finding that Thomas had willfully infringed the copyrights of 24 separate songs owned by some of the plaintiff record companies. It awarded the companies damages in the amount of \$9,250 per song, for a total of \$222,000. This award—the first of its kind for the record companies—was a major victory, and it immediately sent shockwaves through the communities of supporters of file sharers nationwide.

Eleven days after the jury returned its verdict, Thomas filed a motion for a new trial on the grounds that the \$222,000 award is so excessive that it violates the Due Process Clause of the United States Constitution. According to Thomas' brief in support of her motion, the actual damages suffered by the record companies as a result of Thomas' copyright infringement would be no more than \$20.00. Any damages above that amount, Thomas argues, are punitive in nature and thus must be within the constitutional framework established by the U.S. Supreme Court. Thomas further asserted that an award of \$222,000 was not within that constitutional framework, and that Section 504 of the Copyright Act, which allows that amount of damages, was therefore unconstitutional as applied against her.

In any federal case where the constitutionality of a federal law is raised, the U.S. government is authorized to intervene and present its argument in support of the law. On Dec. 3, 2007, the United States, through the Federal Programs Branch of the U.S. Department of Justice's Civil Division, exercised that right and filed a motion to intervene in the case. The motion was granted on Dec. 6, 2007. This maneuver was expected, but nonetheless represented the second major victory for the record companies. The federal government has shown its willingness to support the record companies in the cases against individuals using file sharing networks to unlawfully distribute copyrighted music.

While it is true that an award of \$222,000 for infringing the copyrights of 24 songs seems harsh, it is also true that statutory damages have existed and been upheld for copyright infringement for over 200 years. Courts have long noted that there is a distinction between statutory damages and punitive damages. This is the heart of the problem with Thomas' challenge to the constitutionality of the application of Section 504 of the Copyright Act. While Thomas is correct that the U.S. Supreme Court applies a heightened standard to awards of punitive damages, the same is not true for awards of statutory damages.

Under Supreme Court precedent, statutory damages are examined to determine whether they are "so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable." *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 67 (1919). Courts have determined that this standard is even more deferential than an abuse of discretion standard when reviewing an award of statutory damages within the allowed range under the Copyright Act. Congress expressly sought to make the cost of infringement significantly more burdensome than the cost of compliance, so that there is a strong incentive to abide by the Copyright Act. Given the importance of protecting valid copyrights and the real concern that it is often impossible to accurately calculate actual damages suffered as a result of copyright infringement, several courts have found that awards of statutory damages under Section 504 of the Copyright Act are not so severe, oppressive, or unreasonable as to be unconstitutional.

In Thomas' case, despite her obviously sympathetic cir-

cumstances, the facts present a compelling argument in favor of upholding the constitutionality of the award of statutory damages under Section 504 of the Copyright Act. The jury's award of \$9,250 per song was less than 10 percent of the possible award for her willful infringement. The award against Thomas could have been as high as \$3,600,000 if the jury had awarded the maximum amount under Section 504. Moreover, while Thomas claims that the actual damages suffered by the record companies were less than \$20.00, that calculation does not take into account the fact that each of the 24 songs she shared online could have been downloaded by millions of other users—which would make the actual harm in the millions of dollars and significantly greater than the \$222,000 award.

Copyright laws encourage creativity, and without protection, there will be no incentive to invest time and money developing music, books, software, or other arts. These concerns led Congress to authorize the statutory damages like those awarded against Thomas. Courts have long recognized the importance and constitutionality of such awards of statutory damages, and those damages awarded against Thomas will likely be upheld. ■

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